REPORTABLE

CASE No. SA 26/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between

GAMIKAUB (PTY) LTD **APPELLANT**

and

HEINER SCHWEIGER **RESPONDENT**

Coram: Maritz, JA, Chomba, AJA, et O'Linn, AJA

Heard on : 2006/07/05

Delivered on: 2008/11/24

APPEAL JUDGMENT

CHOMBA, AJA: [1] This appeal emanates from an order whereby the court *a quo* granted summary judgment to the respondent who had earlier, by notice, applied for such judgment. The matter was commenced by combined summons issued at the instance of the respondent and when that was served on the appellant, a notice to defend was filed on its behalf. However, as is authorized by the rules of court in appropriate circumstances, the respondent, by affidavit accompanying the application for summary judgment, deposed that the appellant

had no *bona fide* defence and that the notice of intention to defend had been filed solely for the purpose of delay. In response thereto, the appellant filed an affidavit in opposition. On the return day of the notice of set down for the hearing of the application for summary judgment, the appellant was represented by Mr. Bloch whereas the respondent was represented by Mr. Vaatz.

[2] In this judgment I shall, for the sake of convenience, refer to the respondent as the plaintiff and the appellant as the defendant company.

[3] The brief facts of this matter may be stated as follows. According to the particulars of claim, the plaintiff was a farmer resident at farm Gamikaub, No. 78 in the District of Karibib. During the period 1993 to 2003 the plaintiff was a shareholder in the defendant company. As such the plaintiff loaned to the defendant company a sum of N$1 678 584,19 “at the defendant company’s instance and request.” On 23 April 2004, Mr. Bloch, in his capacity as legal practitioner and representative of Mr. K.D. Schacht, who was then a 50% shareholder and director of the defendant company, acknowledged the said indebtedness of the defendant company to the plaintiff. Mr. Bloch did so in a document which carried his name at the top of it but was otherwise headed “To whom it may concern.” That document was annexed to the particulars of claim and was marked "A".

[4] In the affidavit in opposition to the application for summary judgment, two main defences were raised. In terms of the first defence, notwithstanding the admission of the aforementioned indebtedness, it was alleged on behalf of the defendant company that the plaintiff, in his capacity as a co-director of that company, had signed a memorandum of agreement whereby he formally subordinated his claim against the defendant company for the benefit of its other creditors. For ease of reference the relevant parts of the memorandum of agreement relied on by the defendant company were couched in the following terms:

> "Memorandum of Agreement
>
> between
>
> H. Schweiger and Gamikaub (Pty) Ltd.
>
> WHEREAS
>
> A. H. Schweiger is a major shareholder (a substantial creditor) of Gamikaub (Pty) Ltd.
>
> B. H. Schweiger has agreed to assist Gamikaub (Pty) Ltd by subordinating, subject to certain terms and conditions, his claim against Gamikaub (Pty) Ltd and in favour and for the benefit of other creditors of Gamikaub (Pty) Ltd.
>
> C. It is desirable to record the matters agreed upon.
>
> NOW, THEREFORE, it is agreed as follows:

1. (not contentious)

2. In order to assist Gamikaub (Pty) (Ltd), H. Schweiger agrees, subject to the limitation imposed in 4, that:

   2.1 He subordinates for the benefit of the other creditors of Gamikaub (Pty) Ltd, both present and future;

   so much of his claim against Gamikaub (Pty) Ltd as would enable the claims of such other creditors to be paid in full, alternatively

   so much of his claim against Gamikaub (Pty) Ltd as would enable the claims of such other creditors to be paid in full, but not exceeding the amount recorded in clause 1, alternatively

   the amount of N$1, 605, 863,00

3. (not contentious)

4. The subordination referred to in 2 shall remain in force and effect for so long only as the liabilities of Gamikaub (Pty) Ltd exceed its assets, fairly valued, and shall lapse immediately upon the date that the assets of Gamikaub (Pty) Ltd exceed its liabilities and shall not, except by further agreement in writing, be reinstated if thereafter the liabilities of Gamikaub (Pty) Ltd again exceed its assets, provided that the liabilities of Gamikaub (Pty) Ltd shall be deemed to continue to exceed its assets, unless and until the auditor of Gamikaub (Pty) Ltd has certified in writing that he has been furnished with evidence which reasonably satisfies him that the liabilities do not exceed the assets.

5. H. Schweiger hereby agrees that until such time as the assets of Gamikaub (Pty) Ltd, fairly valued, exceed its liabilities and the auditor’s certificate referred to in 4 has been issued, he shall not be entitled to demand or sue for or accept repayment of the whole or any part of the

> said amount owing to him by Gamikaub (Pty) Ltd, and set-off shall not operate in relation to the subordinated claim in respect of any debts owing by him now or in the future, provided that if the auditor of Gamikaub (Pty) Ltd shall certify in writing that he has been furnished with evidence which reasonably satisfies him that the amount of the subordinated claim exceeds the amount by which the liabilities of Gamikaub (Pty) Ltd exceed its assets, such excess portion of the subordinated claim as is specified in the said certificate shall be released from the operation of this agreement. It is recorded that H. Schweiger acknowledges that he is responsible for requesting the auditor to issue the said certificate and for the costs in this connection.

6, 7, 8 – (not contentious)."

[5] The other main defence was that the defendant had a *bona fide* defence. In summary and according to the findings of fact by the learned judge *a quo,* the defendant company's claim against the plaintiff amounted to a liquidated sum of N$521, 292.27 plus an alleged substantial unliquidated sum. Exhibited to the affidavit in opposition to the application for summary judgment was a combined summons in a separate case (namely cause number I.1881/2005) and in the particulars of claim accompanying the said summons were reflected the details of that claim. What the learned trial judge did in arriving at the award of the summary judgment was to subtract the liquidated sum of N$521 292.27 from the plaintiff's claim of N$1 678, 584.19, thereby determining the defendant company's indebtedness at a reduced amount of N$1 157 291.92. Therefore in arriving at the amount of the summary judgment the unliquidated claims were not taken into account.

[6] In this court the appeal was argued by Mr. Tötemeyer on behalf of the defendant company and Mr. Mouton represented the plaintiff.

Grounds of appeal

[7] The appeal was premised on two grounds as follows:

> "6.1 The court *a quo*, whilst correctly taking into account appellant's counterclaim in holding that appellant partially has a *bona fide* defence – thereby granting summary judgment in a reduced amount – erred by only taking the liquidated portion of such counterclaim into account;
>
> 6.2 The court *a quo* respectfully erred in holding that the absence of an auditor (sic) certificate provided for in the relevant subordination agreement – the existence of which constituted a condition precedent for the respondent's claim to become due and payable – was no bar to the enforcement of respondent's claim."

The issues arising in the appeal and assessment thereof

[8] The issues to be considered and resolved in this appeal are two only, viz:

(a) whether the defendant succeeded in disclosing a *bona fide* defence to the claim in respect of which the plaintiff applied for summary judgment.

(b) whether the absence of the auditor's certificate as required under the subordination agreement militated against entry of summary judgment in favour of the plaintiff.

[9] I propose to and will deal with the second issue first. As is evident, this issue arises from the existence of the subordination agreement which the plaintiff undoubtedly signed as signified in paragraph [4] above. The overall effect of that agreement was that the plaintiff thereby undertook to "assist Gamikaub (Pty) Ltd by subordinating……his claim against Gamikaub (Pty) Ltd and in favour and for the benefit of other creditors of Gamikaub (Pty) Ltd." The undertaking was conditional and the condition was adumbrated by clause 2 which stated that the agreement was subject to the limitation imposed in clause 4 of the agreement. (the emphasis is mine)

Clause 4, as we have seen, is the one which had the effect that the subordination would remain in force for as long as the defendant company's liabilities continued to be in excess of its assets and included a deeming provision that the liabilities would continue to be in excess of the assets until the defendant company's auditor, upon evidence received, certified that the assets were in excess of the liabilities. Clause 5 made the plaintiff's claim against the defendant company unenforceable unless and until such certificate was issued.

[10] It is indisputable that no auditor's certificate was furnished prior to the inception of the action by the plaintiff. The issue is whether the absence of the certificate meant that the plaintiff was inhibited from suing for what was plainly an admitted indebtedness. I endorse the dictum of Cameron JA in the case of *Cape*

Produce Co (PE) (Pty) Ltd v Dal Maso and Another NNO 2002 (3) SA 752 at 764A - D. For the sake of clarity it is apt to first of all give a resume' of the facts of that case as culled from the unanimous judgment of the court. The appellant, namely Cape Produce Co (PE) (Pty) Ltd (hereafter CPC), was a creditor to a company known as Alberti Livestock (Alberti) and of which CPC subsequently became the sole shareholder. At a time when Alberti was 'hugely indebted' to CPC, the latter agreed to and did sign a subordination agreement in favour and for the benefit of Alberti's other creditors. The subordination agreement was in identical terms to the one wherewith we are presently concerned. In due course CPC instituted an action against Alberti claiming to be paid the very amount which was subordinated to the other creditors of Alberti. During the trial of the claim uncontroverted evidence was adduced on behalf of CPC that as of the time when the action was instituted, there existed no 'other creditors' of Alberti. Both in the trial court and later in the appellate full court the action failed. It was held that, notwithstanding there being no other creditors of Alberti and because no auditor's certificate had been issued to the effect that Alberti's assets exceeded its liabilities, the subordination agreement was operative. It was consequently held that CPC's debt against Alberti was unenforceable. Cameron, JA's dictum was delivered in the ultimate appeal by CPC to the Supreme Court of Appeal of South Africa. He said –

> "[16] Despite this, both the trial court and the Full Court rejected CPC's contention that the subordination agreement was inapplicable to the claim. Both Courts held that the subordination agreement itself deemed

the excess liabilities over assets to continue until the auditor certified otherwise in writing (clause 4), and that until the certificate in question had been issued, CPC was not entitled to demand or sue for repayment of the debt (clause 5).

[17] I am unable to agree with this approach to the interpretation of the agreement, which, in my view, flies in the face of the parties' intention at the time the agreement was concluded, offends against the elementary conceptions of commercial reality and disregards the purpose for which the contract was created. The critical provision in the agreement is clause 2, and the courts below, in my respectful view, omitted to focus on its effect in contrast to that of clauses 4 and 5. It is clause 2 that creates the subordination. That subordination is stated to be 'for the benefit of other creditors of the company (Alberti). Only so much of CPC's claim is subordinated 'as would enable the claims of such other creditors to be paid in full'. It is this subordination – that is in favour of 'the other creditors' – to which clause 4 expressly refers back. It is in respect of this subordination that clause 4 deems an excess of liabilities over assets to exist until certification, and it is this subordination that clause 5 erects as an impediment to legal action in the absence of certification.

[18] How is clause 2 to be interpreted if it is established without dispute that there are no other creditors at all? In my view, quite clearly the subordination it effects is entirely inoperative, and the deeming provision of clause 4, and the impediment created by clause 5, do not come into operation at all. Clause 4 was plainly designed to create a mechanism of proof to avoid disputes about whether and in what measure Alberti's assets exceeded liabilities. Clause 5 was designed to impede legal action by CPC in the absence of such proof. But where there are in fact no disputes at all, and where no disputes are indeed feasible, because of an absence of any question about the existence of other creditors, the certification requirement is wholly inapplicable." (all underlining supplied).

[11] In our current case it was contended with great verve by Mr. Tötemeyer on behalf of the defendant company that the subordination agreement the plaintiff signed was still subsisting and consequently that the plaintiff's claim was unenforceable. In his heads of arguments he gave a number of reasons to back that contention. One such reason was that the burden to establish that there were no outside creditors of the defendant company, other than the two company officials who signed subordination agreements (including the plaintiff), lay on the plaintiff. I shall deal with this right away. I do not agree with that contention. In this case, the plaintiff alleged that the defendant company owed him a money debt in proof whereof he exhibited the document (the existence and veracity of which have not been disputed) showing that Mr. Bloch had acknowledged the existence of the debt as alleged. In an attempt to refute the enforceability of the plaintiff's claim for the repayment of that debt, it was alleged on the defendant company's behalf that the plaintiff had signed a memorandum of agreement whereby he had subordinated his said claim in favour and for the benefit of other creditors of the defendant company. In other words, the unenforceability was grounded on the assumed operation of the subordination agreement. To the contrary and in my view, when the plaintiff disclosed that the defendant company's legal representative had acknowledged the latter's indebtedness to the plaintiff, the evidential burden at that stage shifted to the defendant company to adduce evidence showing, not only that the plaintiff had signed a subordination agreement, but also the basis on which it was contended that the subordination agreement was operational.

[12] In the second edition of the **Principles of Evidence** by Schwikkard and Van der Merwe it is stated, *inter alia*, at page 538 under the rubric "The Nature and Incidence of the Burden of Proof,' that "(T)he test for determining who bears the burden of proof as set out in *Pillay v Krishna 1946* AD 946*,* is beguiling, for it rather begs the question which of the parties can properly be said to be 'asserting' or 'denying', as the case may be. Nevertheless, it usefully encapsulates the guiding principle, which is that the person who makes a positive assertion is generally called upon to prove it, with the effect that the burden of proof lies generally on the person who seeks to alter the status quo. Most often that will be the plaintiff, and the defendant will bear the burden of proof only in relation to a special defence…. ." (emphasis is supplied). And on page 539, dealing with the evidential burden, the case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) is cited in which Corbett, JA, is reported to have made the following statement at page 548:

> "As pointed out by Davis AJA in *Pillay v Krishna 1946 AD at 952 – 3,* the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In *Brand v Minister of Justice 1959 (4) SA 712 (A)* at 715 Oglivi-Thompson JA called it 'the overall onus.' In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal. This may shift, or be

> transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also *Tregea v Godart 1939 AD 16* at 28; *Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26* at 378 – 9.)"

[13] In the **Introduction to South African Law and Legal Theory,** the learned authors, W.J Hosten, Edwards, Church and Rosman state in the second edition of that work at page 1244 – and in this they agree with Schwikkard and Van der Merwe, see *supra* – that the burden of proof lies on the defendant in respect of a special defence. I quote the authors of both works with approval. I regard the introduction of the subordination agreement as an introduction of a special defence. I also think that the introduction of the subordination agreement was intended to alter the status quo, namely the assertion by the plaintiff that the existence of his claim was acknowledged by Mr. Bloch on the defendant company's behalf. That is yet another reason why I think that the evidential burden shifted to the defendant company.

[14] I am reinforced in the stance I take by the fact that the judgment by Manyarara AJ (in which he determined that the subordination agreement was inoperative by reason of the non-existence of 'other creditors' of the defendant company) was delivered in April 2005. (That was, of course, in a separate but related case where the same parties were involved, and the judgment therein was exhibited in the present case.) In the instant case the defendant company raised the issue of the subordination agreement in an affidavit sworn on its behalf in October, 2005. That was more or less six months down the line after

Manyarara AJ's judgment. Therefore that unfavourable finding by Manyarara AJ must have been fresh in the mind of the defendant company's legal advisers. In this connection I notice that Mr. Bloch was the deponent of the affidavit which brought about reliance on the subordination agreement in the present case. Moreover, he was also the instructing attorney in both the proceedings before Manyarara AJ and also in those before the judge in the court below.

[15] Mr. Tötemeyer argued before us that the position presented by Manyarara AJ regarding there being no other creditors was the position which prevailed in 2005 when he delivered judgment in that other case To that end he submitted that creditors, by their very nature, fluctuate, which expression, if I understood him correctly, meant that even though the position at the time Manyarara AJ gave his judgment was that there were no other creditors, when the current proceedings commenced there could well have existed persons ranking as other creditors. Granted that that might have been the case, the fact is that the subordination agreement, which was a contentious issue before Manyarara AJ was resolved against the defendant. If it was to be relied on in later proceedings, i.e. before Mtambanengwe AJ six months later, surely even common sense would suggest that the new situation, if indeed such new situation did supervene, should be brought to the attention of the latter court, and to be so brought up by the party who/which was bruised in the earlier action. That party was the defendant company, but it did not do so.

[16] I think that it does not lie in the mouth of the defendant company to negate its onus to adduce evidence to establish that there did exist other creditors, for the additional reason that such onus was cast on it by rule 32(3)(b) of the rules of the High Court. That rule provides as hereunder stated:

> "Upon the hearing of an application for summary judgment the defendant may-
>
> (a) N/A
>
> (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or herself or of any other person who can swear positively to the fact that he or she has a *bona fide* defence to the action, and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[17] Quite clearly it was, in my view, incumbent on those representing the defendant company to "satisfy the court" by complying with the duty imposed on the defendant company by rule 32(3)(b) to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." In my opinion, it was deficient of full disclosure to aver merely that a subordination agreement was once signed by the plaintiff. Full disclosure, to my mind, implied disclosing also that the subordination agreement was currently in force by virtues of the existence of other creditors. That would have been the material fact to rely upon.

[18] A further inquiry which one might wish to delve into is with regard to the meaning of the expression “other creditors”, which occurs in clause 2 of the subordination agreement. As we have seen, the clause purports to subordinate the signatory’s loan “in favour and for the benefit of the other creditors of Gamikaub (Pty) Ltd…..” Before arriving at an answer to this inquiry, let me quote *in extenso* relevant heads of argument submitted on behalf of the defendant company. The following was stated by Mr. Tötemeyer in paragraph 24:

> 24. The reliance of the court *a quo* on the judgment in a related interlocutory application concerning the above defence was, with respect, incorrect and cannot avail the respondent (compare: **Record Vol. 2, 128 – 131)**. In that regard:
>
> **24.1** The above finding was based on a finding of fact in the earlier proceedings, namely that the current creditors in the amount of N$66 000.00 which the appellant company previously had, were, as a matter of fact, paid in full and that the appellant company thus had no creditors;
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> **Record, Vol. 2, 88, lines 20-25**
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> **89, lines 1-5**
> **89, line 20**
> **90, line 20**

24.2 The judgment of the Honourable Manyarara AJ was clearly based on contemporaneous facts which were (sic) prevailed no later than 9 November, 2004 when that application was heard.

Record, Vol. 2, 82

24.3 The current creditors, by their very nature, fluctuate. The judgment of the Honourable Manyarara AJ on this issue aptly demonstrates this. This is further demonstrated by the papers in this matter which show that current creditors of the appellant company varied from time to time;

Compare, *inter alia*: **Record, Vol. 1, 33, lines 20-22**

24.4 It is to be pointed out that also the liability of the appellant company on loan account substantially increased (and, in fact, even more than doubled) over time;

Record, Vol. 1, 19, lines 20-25

24.5 It is accordingly submitted that a finding in earlier proceedings that the company had no current creditors as at a particular time (for instance November 2004), was not binding on the court *a quo* in order to determine the factual position concerning the current creditors of the respondent

during November 2005 when the *a quo* proceedings took place (which was a year later);

Record, Vol. 2, 115

24.6 The authority of **Cape Produce Company (PE) (Pty) Ltd,** *supra,* is likewise distinguishable and cannot avail the respondent. In that matter it was found as a fact that it was "*established without dispute*" that there were no other creditors. As a result, the subordination agreement was rendered inoperative and the impediment created thereby did not come into operation;

Cape Produce Co. (PE) (Pty) Ltd, supra,
764 E-F

No such finding was made in *casu.*"

[19] The foregoing quoted arguments are instructive. In them it is, by necessary implication, conceded, for instance, that the other creditors who had at one time existed were those to whom the defendant company had owed N$66 000.00, but that at the time the proceedings before Manyarara, AJ, were ongoing they had been paid in full. Hence, the finding by that judge (and Mr. Tötemeyer's above quoted argument took no issue with that finding) that there existed no other creditors. Yet at the time of drawing up the subordination agreements both Mr. Schacht and the plaintiff herein were

described in their respective subordination agreements as substantial creditors of the defendant company. That was the *status quo* even at the time of the proceedings before Manyarara, AJ. Surely if in their respective subordination agreements each of the two had considered the other as one of the contemplated creditors, the framing of the said agreements was going to make such position crystal clear. Furthermore, instead of being speculative as regards the existence of other creditors by stating that "current creditors, by their very nature, fluctuate," I would have expected Mr. Tötemeyer to have positively asserted that there did exist another creditor, namely Mr. Schacht, at the time the plaintiff instituted his civil action against the defendant company. He did not.

[20] In the light of the foregoing circumstance, I find it compulsively conclusive that the term "other creditors" used in Schweiger's subordination agreement meant creditors other than officials of the defendant company. In this regard I must emphasize that the subordination was expressed to be for the benefit and in favour of creditors "both present and future." (clause 2.1). In the event, it is my confident opinion that there were no other creditors at the time Schweiger commenced his action against the defendant company.

[21] I would consequently endorse the dictum of Cameron JA in *Cape Produce Co (PE) (Pty) Ltd v Dal Maso and Another NNO*, *supra*, that in cases where reliance is pinned on the operation of a subordination agreement, the critical provision in the agreement is clause 2 – the very clause which states

to the effect that the subordination is in favour and for the benefit of the other creditors. The absence of other creditors detracts from the efficacy of the agreement. In the instant case it was not shown that such creditors *existed*. It stands to reason, in my view, that clause 2 having thus become impotent due to there being no other creditors, the conditions in clauses 4 and 5 - which were appendages to clause 2 – cannot have a separate and independent life. Therefore, the absence of the auditor's certificate was inconsequential. I would, in the event, dismiss the ground of appeal in paragraph 6.2 of the heads of argument.

[22] The other issue to be considered is whether the defendant company succeeded in disclosing a *bona fide* defence regarding the counter-claim contained in the affidavit in opposition to the application for summary judgment. The effect of Mr. Tötemeyer's argument, as I understood it, was that a counter-claim, liquidated or unliquidated, amounts to a *bona fide* defence even if its value is less than that of the plaintiff's claim. Counsel extended his submission by asserting that failure by the defendant in summary judgment proceedings to quantify a counter-claim could not detract from his right to be granted leave to defend. In making those assertions he relied on the case of *Standard Bank of Namibia Ltd v Veldsman***,** 1993 NR (HC) at 393.

[23] I notice that the *Standard Bank of Namibia* case**,** *supra,* is a High Court judgment which has no binding authority over this Court. I regard

it as a *non sequitur* in the light of the decision in *Weinkove v Botha,* 1952(3) CPD 178 which, though delivered by a South African court of cognate jurisdiction with that of the High Court of Namibia, is more persuasive. In the latter case it was held that a defendant who is sued for a liquidated sum of money**,** the liability for which he admits, can prevent summary judgment from being entered against him only if he satisfies the court that he has an unliquidated counter-claim against the plaintiff for a sum in excess of the plaintiff's claim. Watermeyer AJ, who delivered the judgment, cited with approval the case of *Trotman and Another v Edwick*, 1950 (1)SA 376 (C) in which Herbstein, J, (with Steyn, J, concurring) had held that when a defendant (who is sued for a liquidated debt which he admits) relies on an unliquidated counter-claim of a value which is less than the plaintiff's claim, he is to be treated as having raised a bad plea which is no defence to the plaintiff's claim. Watermeyer, AJ, also cited with approval *Abbot and Another v Nolte* 1951 (3) SA 419 (C) for the statement that to defeat a summary judgment application, the defendant's unliquidated counter-claim must be in excess of the plaintiff's claim. In the course of his judgment in *Weinkove*, *supra,* Watermeyer, AJ, noted that in *Trotman's* case, Herbstein, J, had reviewed a number of earlier cases in which reliance on unliquidated counter-claims were held to be *bona fide* defences but only when the values of the counter-claims were in excess of the plaintiffs' claims.

[24] In the current case the value of the unliquidated counter-claim relied on has not been positively stated to be in excess of the

plaintiff's claim. At best it has been stated in paragraph 12.1 of the heads of argument that "(T)he said unliquidated counter-claims appear to be quite substantial and a reasonable possibility exists that those may equal (or even exceed) respondent's (i.e. the plaintiff's) claim in convention." Rule 32(3)(b) requires the defendant to "satisfy the court by affidavit….or by oral evidence of himself or herself or of any other person who can swear positively to the fact the he or she has a *bona fide* defence to the action." (the emphasis is mine} It is not, in my opinion, a positive swearing to allege that the unliquidated counter-claims 'appear' to be quite substantial and that a reasonable possibility exists that those 'may' equal or even exceed the plaintiff's claim. The defence has to be positively assertive. I note that even in the court below, Mr. Bloch shied away from positively asserting that the defendant company's unliquidated counter-claims were in excess of the plaintiff's claim. In paragraph 26 of the affidavit in opposition to the summary judgment application, he merely stated that the plaintiff was "indebted to the defendant in many hundreds of thousands of Namibian dollars." That deposition equally failed to meet the requirement of positively swearing that the defendant company had a *bona fide* defence in excess of the plaintiff's claim.

[25] I do not, consequently, accept Mr. Tötemeyer's contention that the mere raising of an unliquidated counter-claim, even if it be of less value than the amount of the claim in convention, would satisfy the test of a *bona* fide defence. I am reinforced in that view by the decisions in *Weinkove,*

*Trotman***,** and *Abbot***,** all *supra.* The rationale for the decisions in these three cases is that if leave to defend is granted to a defendant whose counter-claim is less in amount than the value of the plaintiff's claim, a set-off of the counter-claim would still result in judgment being entered against the defendant for the balance of the plaintiff's claim. Therefore, a summary judgment would avoid an unnecessary continuation of proceedings.

[26] For the foregoing reasons, I would also dismiss the other ground of appeal. In any event this is a case in which, pursuant to rule 32, *supra,* the judge in the court *a quo* had a discretion to grant or not to grant the application for summary judgment. It is a trite principle of law that an appellate court ought not to interfere with a discretionary decision of a trial judge unless failure to so interfere would perpetuate an injustice. In the current case I see no need for interfering with the discretionary decision of Mtambanengwe AJ. Moreover in the present case the defendant company has demonstrated that it has instituted a separate civil action against the plaintiff based on the same unliquidated counter-claims which it has tried to use in an attempt to defeat the plaintiff's application for summary judgment.

In the event, it will – if it has not already done so – undoubtedly prosecute those claims without let or hindrance, which shows that the decision I have arrived at will not occasion an injustice to it.

[24] In the final analysis, therefore, I would dismiss this appeal with costs.

_____
CHOMBA, AJA

MARITZ, JA:

[1] The view I take of the issues in this appeal is narrower in scope than the more comprehensive analysis of the various disputes by my brother Chomba, whose judgment I had the advantage to read. The threshold issue which, in my view, is decisive in this appeal is whether the agreed subordination of the respondent's claim against the appellant continued to constitute an effective bar to its enforceability at the time the action for recovery of the debt was instituted. The history of the matter, the text of the subordination agreement and most of the pertinent facts appear from the judgment of my brother Judge.

[2] It is common cause that the appellant confessed its indebtedness to the respondent in the amount of N$1 678 584.19. The greater part thereof, i.e. N$1 605 863.00, represents the balance of an unsecured, non-interest-bearing shareholder's loan made by the respondent to the appellant before 30 June 1998. It is not clear precisely when respondent advanced the difference of N$72 721.19, but it must have been in the period between the latter date and 24 April 2004 when the respondent's shares in the appellant were sold in execution. During this period, the other 50% shareholder in the respondent, one Schacht, also advanced a further N$2 057 341.00 on top of the balance of N$1 916 185 owing to him as a shareholder's loan for the financial year ending 30 June 1998.

[3] As is so often the case with closely-held corporations where only nominal equity is issued upon registration, undercapitalisation of the appellant necessitated supplementation by shareholders' loans[1] as a means to acquire the assets needed and to cover the expenses incurred in the running of the appellant's farming and related businesses. Although, in the words of Goldstone JA[2] "(i)t is a common occurrence for a private company to embark on trading with a nominal paid-up share capital and to finance its business operations by way of members' loans", the result thereof for the appellant was that its liabilities exceeded its assets by N$1 089 453.00 on 30 June 1998. There may be some difference of opinion on whether the mere fact that the appellant's liabilities exceeded its assets rendered it legally insolvent[3] or whether "the true test of a company's solvency is not whether the company's liabilities exceed its assets but whether it is able to pay its debts",[4] the appellant's continued trading with a significant balance sheet deficit required of the appellant's auditors to report the state of affairs to the Registrar of Companies. To overcome that difficulty and eliminate the risk that the appellant's directors (Schacht and the respondent) might later be accused of reckless or fraudulent trading[5] under insolvent circumstances, the auditors proposed that each of the

[1]Compare, for instance, J.S. McLennan, "*Abuse of Limited Liability, 'Insider Debts' and Subordination Agreements"*, (1993) 110 *SALJ* 686 where he says (at p. 700): "It is a notorious fact that most private companies have only nominal equity capital and are financed largely by loans from its shareholders" and his earlier discussion of the practice at p. 686.

[2] In *Ex Parte: De Villiers and Another NNO; In re: Carbon Developments (Pty) Ltd (In Liquidation),* 1993 (1) SA 493 (A) at 503G-H.

[3]As held by Stegmann J in *Ex Parte: De Villiers & Another NNO; In re: Carbon Developments (Pty) Ltd (In Liquidation)*, 1992 (2) SA 95 (W) at 112A-C: "To my mind the concept of insolvency is clear beyond any doubt. It is the condition of any person, natural or juristic, whose liabilities exceed his assets fairly valued, and who for this reason is unable to pay all of his debts in full, irrespective of the fact that some of such debts may not already have fallen due."

[4] Per Friedman J et Wilson J in *Ex parte: Strydom NO; In re: Central Plumbing Works (Natal) (Pty) Ltd; Ex parte: Spendiff NO; In re Candida Footware Manufacturers (Pty) Ltd; Ex parte: Spendiff NO; In re: Jerseytex (Pty) Ltd,* 1988 (1) SA 616 (D) at 623D-E.

[5]In contravention of s. 424 of the Companies Act, 1973. Compare also: *Howard v Herrigel and Another NNO*, 1991 (2) SA 660 (A) at 672C-E and *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and Others*, 1999 (3) SA 480 (W) at 488I-J.

two shareholders should enter into a subordination agreement with the appellant. The two agreements were executed on 14 November 2002 – the same day on which Schacht and the respondent also approved and signed the 1998-financial statements as directors of the appellant.

[4] Generally speaking, the essence of subordination, Goldstone JA said in the Appellate Division-judgment handed down in the *Carbon Development*'s-case[6] "is that the enforceability of a debt, by agreement with the creditor to whom it is owed, is made dependent upon the solvency of the debtor and the prior payment of its debts to other creditors."[7] The effect of a subordination agreement is therefore not the extinction of the debt but simply to "put in abeyance"[8] or defer its enforcement in favour of other creditors.

[5] The text of the subordination agreement entered into between the appellant and respondent is quoted in part in the judgment of my brother Chomba. The clauses which make up its contents weave an intricate legal web of acknowledgements, limitations, warranties, conditions, undertakings and *stipulationes* which are not exactly easy to unravel and concisely restated. The salient features thereof which bear relevance to this appeal are the following: The parties acknowledged that the appellant was indebted to the respondent in the amount of N$1 605 863.00 on 30 June 2008 (clause 1); the respondent agreed to assist the appellant by subordinating for the benefit of the appellant's present and future creditors so much of his claim as would enable the appellant to pay those

[6] *Supra*, at 504F-G and further.
[7] See also the discussion in *Kalinko v Nisbet,* 2002 (5) SA 766 (W) at 775C.
[8] In the words of Cameron JA in *Cape Produce Company (Port Elizabeth) (Pty) Ltd v Da Maso and Another NNO,* 2002 (3) SA 752 (AD) at 763E.

creditors in full but not exceeding the specified amount (clause 2.1); that the claims of those creditors would rank preferent to the subordinated claim (clause 2.2); that the subordination constitutes a contract for the benefit of those creditors who may accept and enforce its terms (clause 3); that the subordination would remain in force and effect for as long as the appellant's liabilities exceed its assets, fairly valued (clause 4); that unless and until the auditor of the appellant has certified in writing that he has been furnished with evidence which reasonably satisfies him that the appellant's liabilities do not exceed its assets, the converse shall be deemed (clause 4); that until the appellant's assets exceed its liabilities and the auditor has issued the certificate referred to, the respondent "shall not be entitled to demand or sue or accept payment of the whole or any part" of the subordinated claim and set-off shall not operate in relation thereto (clause 5) and that the subordinated claim will not attract any interest (clause 5).

[6] The subordination agreement concluded between the appellant and Schacht, the other shareholder and director, is of the same mould – the only difference being that the subordinated shareholder's loan in his case amounted to N$1 916 185.00.

[7] The subordination of the respondent's shareholder's loan as at 30 June 1998 notwithstanding, he instituted an action for the repayment thereof and of the further advances he had made subsequently. When the action became opposed, the respondent moved an application for summary judgment. The appellant sought to oppose the application by raising a number of defences which are more fully dealt with in the judgment of my brother Chomba. One thereof was that the subordination agreement

deemed that the appellant's liabilities exceeded its assets until the appellant's auditor certified otherwise in writing and that, until the auditors have certified to the contrary, the respondent was not entitled to sue for repayment of the debt. In response, the respondent's legal representative argued with reference to an earlier judgment by another Judge on a different issue that the appellant had no outstanding creditors and, therefore, on the authority of the *Dal Maso*-judgment (*supra*), that the subordination agreement was inoperative.

[8] The Court *a quo* agreed with his submission. It held that the appellant did not place any facts before it "showing whether there were 'other creditors' and if so, who and what claims they had in order to make the agreement operational." He quoted from the *Dal Maso*-judgment where the South African Supreme Court of Appeal dealt with a similarly worded subordination agreement and held as follows:[9]

> "How is clause 2 to be interpreted if it is established without dispute that there are no other creditors at all? In my view, quite clearly the subordination it effects is entirely inoperative, and the deeming provision of clause 4, and the impediment created by clause 5, do not come into operation at all. Clause 4 was plainly designed to create a mechanism of proof to avoid disputes about whether and in what measure (the company's) assets exceeded its liabilities. Clause 5 was designed to impede legal action by (the shareholder/creditor) in the absence of such proof. But where there are in fact no disputes at all, and where no disputes are indeed feasible, because of an absence of any question about the existence of other creditors, the certification requirement is wholly inapplicable." *(The insertions in brackets are mine)*

[9] At 764E-G

With that authority in mind, the learned Judge *a quo* concluded on this issue that the appellant's "reliance on the subordination agreement is thus no defence because such subordination agreements are made for the benefit of outside creditors" and not for the benefit of the appellant as a means to avoid liability.

[9] I must immediately say that I find the comprehensive and closely reasoned analysis of the subordination agreement and the legal principles applicable to it in *Dal Maso's*-case persuasive. It must, however, be distinguished from the issue in this case: In *Dal Maso's*-case the sole shareholder who had earlier subordinated his claim was also the sole creditor of the company. There were no "other creditors". In this appeal there were two shareholders at the time who, in separate instruments, subordinated their respective claims as at 30 June 1998 and, importantly, thereafter made further substantial advances as shareholders' loans to the company. The question which presents itself is whether the subordination of the respondent's claim "for the benefit of the other creditors of (the appellant), both present and future" includes the other shareholder, Schacht as a creditor in respect of the advances made by him (a) before 30 June 1998 and (b) those made thereafter.

[10] The appellant submits that it does. In the opposing affidavit filed on its behalf, the deponent Bloch says that the substantive subordination of their respective claims against the appellant for the benefit of the other creditors "included both outside creditors as well as each other in respect of their loan accounts". In what follows, I shall first examine whether Schacht was one of the "other creditors" of the appellant in as far as he made

further advances of about N$2.1 million after 30 June 1998 on top of his subordinated claim of approximately N$1.9 million as at that date.

[11] The contents of subordination agreements are tailored to meet the legal and financial exigencies which they are designed to address. As McLennan[10] points out, the ranges of subordination varies from weak (i.e. subordination of the debt for a short time subject to the payment interest and repayment in instalments during that period) to strong (e.g. subordination of present and future loans until winding up with no interest or repayment provisions) and that variations between the two extremes are endless[11]. One of the variations, he points out, is subordination limited to a specified amount. Although it is evident from the facts advanced in the opposing affidavit that the sum of the two subordinated claims (approximately N$3.5 million) by far exceeded the liquidity shortfall of the appellant (N$1.1 million) on 30 June 1998, it is apparent from the wording of clause 2 of the agreements that both the respondent and Schacht subordinated only as much of their claims as would be required to pay its creditors at any particular time in full but, in any event, subject to a maximum individual exposure equivalent to the amounts expressly stipulated in their respective agreements with the appellant. Even though the exposure of the respondent and Schacht under the agreements may therefore be less than

[10] *Op. cit.*, at 690.

[11] Goldstone JA in the *Carbon Developments*-case, *supra*, at 504G-H also commented on the many forms such agreements may take: "Subordination agreements may take many forms. They may be bilateral, ie between the debtor and the creditor. They may be multilateral and include other creditors as parties. They may be in the form of a *stipulatio alteri*, ie for the benefit of other and future creditors and open to acceptance by them. The subordination agreement may be a term of the loan or it may be a collateral agreement entered into some time after the making of the loan."

the stipulated amounts at any given time[12], it may not be more – the maximum being approximately N$1.6 million for the respondent and N$1.9 million in respect of Schacht.

[12] An agreement by any creditor to rank his or her claim behind other creditors of the company by necessity involves a restriction on the enforceability thereof and diminishes the prospects of its ultimate recovery. As such, the extent of the subordination must be apparent and cannot be assumed to be more onerous that provided for or contemplated in the express or implied provisions of the agreement. In this instance, the upper limit of the subordinated claims has been expressly stipulated. A shareholder may therefore subordinate only part of the amount owed to him by the company on his or her loan account and not the remaining balance. A case

in point is that of *Venter NO v Barsouth Investments (Pty) Ltd*.[13] The company, Arc Mining Timber (Pty) Ltd, was indebted to one of its shareholders, the defendant (Barsouth), in the amount of R260 000 at the end of the 1983 financial year. Given Arc's apparent insolvent state, its auditors were unwilling to sign its financial statements for the year ending 28 February 1983 and Barsouth, who had advanced a further shareholders' loan of R1.3 million after that date, agreed on 18 October 1983 to subordinate its claim for R260 000. Although one of the auditors and a former majority shareholder later testified that their understanding of the subordination agreement was that it related to

[12]Compare, in addition to clause 2, the provisions of clause 5 which allows for the release of the excess portions of the subordinated amounts to the extent certified by the appellant's auditor.
[13]1992(2) SA 78 (C)

Barsouth's claims under both the first and second loan agreements, Scott J did not agree. He held as follows[14]:

> "It is clear from the wording of the agreement, however, that this was not so and that the subordination was intended to apply only to the defendant's claim which existed on 28 February 1983, and not the claim under the second loan agreement …."

[13] The similarity of those facts to this case is striking. It reinforces my conclusion that the further advances of ±N$0.72 million made by respondent and that of ± N$2.06 million by Schacht to the appellant after 30 June 1998 do not form part of the consensual subordination of their claims which arose from advances made before that date. Therefore, the status of both the respondent and Schacht as concurrent creditors of the appellant and the concurrent ranking of their claims arising from the later shareholders' loans (i.e. post 30 June 1998) with the claims of other creditors (if any) have not been compromised by the subordination of their claims which had arisen pursuant to advances made prior to 30 June 2008.

[14] To hold otherwise will not only fly in the face of the limited scope and range of an earlier subordination but will also have a dampening effect on shareholders' future incentives to finance fresh commercial projects of companies which require further investment beyond their available equity; to provide financial means to undercapitalised companies to generate wealth and, in certain instances, to provide much needed loans to prevent commercial insolvency in circumstances where their investments are tied up in long terms projects or fixed assets. In the absence of an agreement to the contrary, the

[14] At 81C-D.

subordination of a claim in a stipulated amount due to a shareholder on a particular date does not mean that all future advances made by the shareholder to the company will also be regarded as subordinated claims.

[15] This reasoning leads to the inevitable conclusion that Schacht's shareholder's loan to the appellant in the sum of ±N$2.57 million advanced after 30 June 1998 was not subordinated in terms of the subordination agreement executed by him on 14 November 2002. There is nothing on the papers suggesting that he was not, at least to that extent, a concurrent creditor of the appellant at the time the respondent instituted the action. I pause here to point out that there is also no suggestion in either the text of the subordination agreement or in *Dal Maso's* case that subordination is only for the benefit of "outside" creditors (i.e. creditors other than shareholders) – as the Court *a quo* seemingly reasoned. The point may perhaps be best illustrated by an example: A parent who by advancing loans has financed his or her child's company without owning any shares therein may well agree to subordinate his claim for the benefit of other creditors as a means for the company to raise further finance. Can it be said that notwithstanding the subordination of the parent's claim for the benefit of "other creditors" does not include the child as creditor of the company if he or she has made a shareholder's loan to it? What would be the legal basis for not ranking the child's claim arising from such loans concurrently with those of other trade creditors (and above the parent's subrogated claim) upon winding-up?

[16] Even though shareholders' claims are most often subordinated as a mechanism to induce others to advance funds or to provide goods or services on credit to a company, they are by no means the only category of claims that may be subordinated. Quoting from Johnson's article "*Subordination Agreements*",[15] McLennan[16] cites further reasons why "outside" creditors may be willing to subordinate their claims: "A creditor may wish to advance funds, and due to lending restrictions imposed on the borrower by other creditors, it may only be possible to lend on a subordinated basis" and because "(h)igher interest rates, or a large commitment fee, may be payable on the subordinated debt". In the absence of an agreement to the contrary, does it mean that a shareholder who thereafter wish to lend money to the company may not assume, in assessing the risk of his loan, that his or her exposure is not also reduced by the subordination of the "outside" creditor's debt "for the benefit of the company's other creditors, both current and future"?

[17] In summary, I am satisfied that the appellant's defence to the respondent's application for summary judgment discloses that, at the time the respondent instituted the action, Schacht was a creditor of the appellant in the amount of at least N$2 057 341.00 owing to him on a shareholder's loan advanced after 30 June 1998; that, in relation to that advance, he was also a "future" creditor of the appellant for whose benefit the respondent subordinated his claim of N$1 605 863.00 against the appellant on 14 November 2002; that the subordination at least to that extent, is what is being contemplated in clause 4 of the subordination agreement signed by the respondent; that the deemed excess of the appellant's liabilities over its assets until certification to the contrary applies as

[15] (1961) 70 *Yale Law Journal*, note 8 at p 84-85
[16] *Op. cit.*, at p. 691

contemplated in that clause; that the appellant's liabilities actually exceeded its assets as contemplated in clause 5 of the agreement (in addition to it being assumed); that an auditor's certificate to the contrary has not been issued under clauses 4 and 5 and, finally, that the respondent was precluded by clause 5 of the subordination agreement from suing the appellant for payment of the subordinated debt.

[18] Given the conclusion I have arrived at, it is not necessary for me to decide whether Schacht was not also an "existing" creditor of the appellant on 30 June 1998 for whose benefit the respondent subrogated his claim in terms of clause 2 of the agreement. Suffice it to say that, given the severe and extraordinary nature of summary judgment-procedure, the question – at the very least – raise difficulties of construction and issues of fact and law which, in my view, ought to be left for decision in the course of the action proceedings. In *Arend v Astra Furnishers (Pty) Ltd*[17], Corbett J (as he then was) dealt with the nature of summary judgment proceedings in the following passage:

> "In my view, an important factor to be taken into account by the Court in determining how to exercise its discretion is the consideration that the procedure of summary judgment constitutes an extraordinary and very stringent remedy: it permits a final judgment to be given against a defendant without a trial. It is designed to prevent a plaintiff having to suffer the delay and additional expense of the trial procedure where the defendant's case is a bogus one or is bad in law and is raised merely for the purpose of delay, but in achieving this it makes drastic inroads upon the normal right of a defendant to present his case to the Court."

[17] 1974 (1) SA 298 (C) at 304 F-H

[19] Many judgments, before and since, have sought to define the approach to be adopted in deciding whether to grant or refuse summary judgment.[18] It is not necessary for purposes of deciding this appeal – and I do not propose - to analyse the differing formulations, except to say that they are generally conservative: "(t)he grant of the remedy is based upon the supposition that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad in law"[19]. The interpretational issue which I have referred to earlier in this paragraph is not one which is either bogus or patently bad in law. Assessed at its very lowest, it is a clearly arguable question of law which "summary judgment proceedings are inappropriate for dealing with"[20] which falls to be dealt with more appropriately in the course of other action proceedings.

[20] What remains is to deal with the part of the respondent's claim which has not been subrogated, i.e. the N$72 721.19 which he advanced on loan account after 30 June 1998. The Court *a quo* held that the appellant's opposing affidavit showed that it had a liquidated counterclaim against the respondent for N$521 292.27 which may be set off against the respondent's claim for purposes of assessing the *bona fides* of the appellant's defence. Even if I were to discount the unliquidated part of the appellant's counterclaim for purposes of set-off, the remainder amply takes care of the unsubordinated portion of respondent's claim.

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[18] Compare, for instance *Roscoe v Stewart*, 1937 CPD 138; *Wise & Co. (Africa) Ltd. v Gin*, 1946 CPD 524 at 526; *Mowschenson and Mowschenson v Mercantile Acceptance Corporation*, 1959 (3) SA 362 (W) at 366; *Maharaj v Barclays National Bank Ltd,* 1976 (1) SA 418 (A) at 423F – G and *Myburgh v Commercial Bank of Namibia,* 2000 NR 255 (SC) at 271B, to mention a few.

[19] Per Corbett JA in *Maharaj's* case, *supra*, at 423F – G. Compare also: *Tesven CC v SA Bank of Athens,* 2000 (1) SA 268 (SCA) at 275H- 276F and the judgment of Strydom JP in *Kelnic Construction (Pty) Ltd v Cadilu Fishing (Pty) Ltd,* 1998 NR 198 (HC) at 202D-E where he endorsed the approach that Courts should only grant "summary judgments in instances where the applicant's claim is unanswerable.".

[20] Per Goldblatt J in *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd,* 1993 (3) SA 574 (W) at 576H-I

[21] In the result, I propose that the following order be made:

1. The appeal succeeds with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The order of the High Court made on 28 November 2005 granting the respondent summary judgment in the amount of N$1 157 291.92 and costs is set aside and the following order is substituted:

"1. The application for summary judgment is dismissed.

2. The costs of the application will stand over for determination in the main action."

MARITZ, J.A.

O'LINN, AJA:

[1] The background and the issues have been sufficiently set out in the proposed judgments of my brothers Chomba and Maritz. The main difference in the motivation of the proposed judgments of my brother Maritz and that of my brother Chomba appears to be in the interpretation of the words in clause 2.1 of

the subornation agreement, being the words underlined in the following sentences:

(i) "He subordinates for the benefit of the other creditors of Gamikaub (Pty) Ltd, both present and future;

(ii) ."…So much of his claim against Gamikaub (Pty) Ltd as would enable the claims of such other creditors to be paid in full …"

(iii) "…Alternatively, so much of his claim against Gamikaub (Pty) Ltd as would enable the claims of such other creditors to be paid in full…"

[17] It is common cause that both Schacht and Schweiger were shareholders and directors of the company; both gave loans to the company and in accordance with a proposal of the auditors, had signed similar subordination agreements on the same date being 14th November 2002; both approved and signed on the same day the 1998 financial statements as directors of the company Gamikaub.

(See proposed judgment by Maritz, p. 3-4, par. 3.)

[18] It is also common cause that Gamikaub had acknowledged that it was indebted to Schweiger in the amount of the loan, being N$1, 678,584.19 but

Gamikaub raised as a defence that the subornation agreement between Schweiger and the company prevented payment at the time the action was instituted.

[19] It seems to me in this regard that my brother Chomba is correct where he says in par 11 on p. 10 of his proposed judgment, that when the company acknowledged its indebtedness to Schweiger, the evidential burden shifted to it, to show, "not only that the plaintiff had signed a subordination agreement, but also the basis on which it was contended that that subordination agreement was operational."

[20] To prove that it was operational, the company had to prove *inter alia* that the words "other creditors" in the subordination agreement meant and were intended by the signatories to mean, creditors including those that had signed the subornation agreements. In the absence of such proof, there was no evidence that the company at that point in time was indebted to creditors other than Schweiger and Schacht whose debts had to be paid in preference to that of Schweiger and Schacht.

[21] It was also a requirement for the subornation agreements to become effective, that the liabilities of the company must exceed the assets, but this fact had to be presumed as long as there was no certificate by the auditors of

Gamikaub that "he has been furnished with evidence which reasonably satisfied him that the liabilities do not exceed the assets."

[22] In view thereof that there was no such certificate, it had to be presumed that at the time of the action instituted by Schweiger, the liabilities still exceeded the assets. If Schweiger wanted to prove otherwise, he had to produce such a certificate, which he had failed to do.

[23] Nevertheless, Gamikaub's special defence against the claim for payment by Schweiger had to fail, unless it alleged and proved in accordance with Rule 32(3)(b) of the High Court Rules, that the subordination agreement was effective and delayed payment of the acknowledged indebtedness to Schweiger at that point in time.

[24] It seems to me that such allegation and proof were absent at the stage when the Court *a quo* had to decide whether or not summary judgment was justified.

[25] This is so because there was no allegation or proof that there were "other creditors" for the benefit of whom, Schweiger's subordination agreement could be implemented. If Schacht was excluded because of the correct interpretation of the words – "other creditors" then the "subordination agreement" could not serve as a successful defence for Gamikaub.

[26] I submit furthermore that the words “other creditors” are ambiguous and could mean either creditors who included creditors who had entered into subordination agreements, or only creditors other than those who had entered into subornation agreements.

[27] When I visualize that both Schacht and Schweiger were shareholders and directors, became creditors of Gamikaub by virtue of loans by them to Gamikaub, had signed similar subordination agreements, and that each of them would have known about the other’s commitment and intention, it seems improbable that they could have intended when using the words “other creditors” that each of them intended to subjugate the debt owing to himself, to such other director/shareholder who had signed a similar subornation agreement. The effect of such interpretation was that none of the two directors/shareholders could successfully demand repayment of their loans to the company and could thus not qualify as being one of the other creditors for the benefit of whom the subornation agreements were entered into. Such interpretation would lead to an absurd result. There is in our law a presumption against an absurd result when interpreting a contract.

[28] In my respectful opinion the two aforesaid shareholders/directors/creditors, never intended such an absurd outcome and intended the words “other creditors”

to mean outside creditors, who are not shareholders/directors/creditors who had entered into subordination agreements.

[29] However, even if the term “other creditors” is interpreted as being creditors other then directors and shareholders who have signed subordination agreements, i.e. outside creditors, clause 4 of the subordination agreements still has to be considered.

[30] Clause 2 is subject to the limitation imposed in clause 4. What is this limitation is stated as follows:

> “The subordination agreement referred to in 2 shall remain in force and effect for so long only as the liabilities of Gamikaub (Pty) Ltd exceed its assets, fairly valued, and shall lapse immediately upon the date that the assets of Gamikaub (Pty) Ltd exceed its liabilities…”

[31] It is clear that the liabilities are deemed to exceed the assets for as long as the auditors of Gamikaub has not certified the contrary. The *onus* is on the creditor to obtain such certificate.

[32] Such certificate was never obtained and consequently it had to be presumed that at the time the plaintiff Schweiger instituted his action and eventually obtained summary judgment, it still had to be presumed that the liabilities of the company exceeded its assets.

[33] There was also no other evidence controverting the aforesaid presumption. The question is: What is the effect of the assumed fact that the liabilities exceeded the assets?

[34] It is true that clause 2 of the subordination agreements clearly shows that the intention of the signatories to the subordination agreements was to subjugate so much of the claims of the creditors who had signed the subordination agreements, as would enable the claims of "such other creditors to be paid in full," alternatively so much of the claims of such other creditors against Gamikaub as would enable the claims of such other creditors to be paid in full, but not exceeding the amount recorded in clause 1…"

[35] In this case there was no allegation or evidence, that there were creditors, other than Schweiger and Schacht. There was therefore no creditor fitting the term "other creditors" or "outside creditors" i.e. other than Schweiger and Schacht, who were directors and shareholders of Gamikaub, and who had signed subjugation agreements in order to assist their company, Gamikaub.

[36] This case could therefore be distinguished from the South African decision in Cape Produce Co (PE) v Del Maso An NNO 2002(3) SA 752 – 764 A-D where there was "uncontroverted evidence" on behalf of CPC, i.e. the party to whom the company Alberti was indebted and who had entered into a subjugation

agreement with Alberti in regard to Alberti's debt to CPC. That evidence was to the effect that there did exist "other creditors."

[37] In the present case there was no evidence at all regarding the issue whether or not there were "other creditors" at the stage when summary judgment was requested by Schweiger against Gamikaub and granted by the Court *a quo.*

[38] The only creditors on record in this case at the time were Schacht and Schweiger.

[39] The existence of the subjugation agreement was also not in dispute. But whether or not it was effective to delay payment to Schweiger at the time of the application for summary judgment, depended on its interpretation.

[40] If the words "other creditors" were interpreted as creditors other than those who had signed the subjugated agreements, then Schweiger should succeed because the subordination agreement would not be effective to delay payment of his claim in favour of such other creditors, because there was no proof of the existence of such other creditors.

[41] Gamikaub's defence had to fail unless it could prove that the subjugation agreement was effective at the time of the action, because there were creditors at that time, other than Schacht. That it failed to allege and prove.

[42] There is however one other issue that needs some further consideration: That issue is the effect if any of the fact that in terms of clause 4 of the agreement, it had to be assumed for the purpose of the action launched by Schweiger, that the company's liabilities exceeded its assets:

[43] As I see it, clause 2 of the subjugation agreement must not only be read in conjunction with clause 2, but clause 2 is stated to be subject to the limitation imposed in clause 4. Consequently the subjugation remains in force and effect as long as the company's liabilities exceeded its assets, i.e. it remains in force and effect as contemplated in clause 2.1, i.e. "for the benefit of the other creditors of Gamikaub (Pty) Ltd., both present and future."

[44] If clause 2.1 is interpreted as submitted supra, clause 4 does not lead to a different result on the facts of this case, because it was not alleged and proved that there were "other creditors" in the sense set out above.

[45] The Court *a quo* was consequently correct in granting summary judgment to plaintiff – Schweiger.

[46] In the result the appeal should be dismissed with costs as proposed by my brother Chomba, AJA.

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O’LINN, AJA

ON BEHALF OF THE APPELLANT:	Mr. R. Tötemeyer
Instructed by:	C. Brandt Attorneys
ON BEHALF OF THE RESPONDENT:	Mr. C.J. Mouton
Instructed by:	A. Vaatz & Partners